ND
IEF8

Supreme Court, U.S.
FILED
NOV 10 2016
OFFICE OF THE CLERK

No. 16-466

In The Supreme Court of the United States

BRISTOL-MYERS SQUIBB COMPANY,

Petitioner,

v.

SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF SAN FRANCISCO, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the California Supreme Court

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

HUGH F. YOUNG, JR.
Product Liability Advisory Council, Inc.
1850 Centennial Park Dr.
Suite 510
Reston, VA 20191
(703) 264-5300

ALAN E. UNTEREINER
Counsel of Record
Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP
1801 K Street, N.W.
Suite 411L
Washington, D.C. 20006
(202) 775-4500
auntereiner@robbinsrussell.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICUS CURIAE* 1

STATEMENT 1

SUMMARY OF ARGUMENT 7

ARGUMENT 9

I. THIS COURT SHOULD RESOLVE THE SERIOUS CONFLICT AND CONFUSION IN THE LOWER COURTS OVER A CRUCIAL DUE PROCESS LIMITATION ON SPECIFIC JURISDICTION 9

A. There Is Widespread Confusion Concerning The Meaning Of The Nexus Requirement 10

B. Without Further Clarification Or Refinement By This Court, "Relates To" Is Not A Meaningful Or Predictable Standard 12

C. The "Substantial Connection" Test Used Below Imposes No Meaningful Or Predictable Limits On Relatedness 14

D. A "Sliding Scale" Only Compounds The Indeterminacy And Lack Of Predictability 17

TABLE OF CONTENTS—continued

Page

E. The Decision Below Ignores And Undermines This Court's Recent Teachings 19

II. THE QUESTION PRESENTED IS RECURRING AS WELL AS CRITICALLY IMPORTANT TO PRODUCT MANUFACTURERS BOTH LARGE AND SMALL 21

A. The Issue Arises With Great Frequency 21

B. The Issue Is Enormously Significant 22

CONCUSION 25

APPENDIX 1a

TABLE OF AUTHORITIES

Page(s)

Cases

Baldwin v. *Alabama*,
472 U.S. 372 (1985) 11

Burger King Corp. v. *Rudzewicz*,
471 U.S. 462 (1985) 2, 9, 13

California Division of Labor Standards Enforcement v. *Dillingham Construction, N.A., Inc.*, 519 U.S. 316 (1997) 13

Carnival Cruise Lines, Inc. v. *Shute*,
498 U.S. 807 (1990) (order) 4, 17

Carnival Cruise Lines, Inc. v. *Shute*,
499 U.S. 585 (1991) 4, 10, 12, 17

Daimler AG v. *Bauman*,
134 S. Ct. 746 (2014) ..... *passim*

De Buono v. *NYSA-ILA Medical and Clinical Services Fund*, 520 U.S. 806 (1997) 13

Goodyear Dunlop Tires Operations, S.A. v. *Brown*, 564 U.S. 915 (2011) ..... *passim*

H.J. Inc. v. *Northwestern Bell Telephone Co.*,
492 U.S. 229 (1989) 13

Hanson v. *Denckla*, 357 U.S. 235 (1958) 24

Helicopteros Nacionales de Colombia, S.A. v. *Hall*, 466 U.S. 408 (1984) 3, 10, 12

International Shoe Co. v. *Washington*,
326 U.S. 310 (1945) 2

J. McIntyre Machinery, Ltd. v. *Nicastro*,
564 U.S. 873 (2011) 5, 17

TABLE OF AUTHORITIES—continued

Page(s)

Kulko v. *Superior Court of California*, 436 U.S. 84 (1978) 2

Nowak v. *Tak How Investments, Ltd.*, 94 F.3d 708 (1st Cir. 1996) 21

O'Connor v. *Sandy Lane Hotel Co.*, 496 F.3d 312 (3d Cir. 2007) 11, 12, 18

PLIVA, Inc. v. *Mensing*, 564 U.S. 604 (2011) 15

Riegel v. *Medtronic*, 552 U.S. 312 (2008) 15, 16

Shoppers Food Warehouse v. *Moreno*, 746 A.2d 320 (D.C. 2000) (en banc) 11

Shute v. *Carnival Cruise Lines*, 897 F.2d 377 (9th Cir. 1990), rev'd, 499 U.S. 585 (1991) 4

Tamburo v. *Dworkin*, 601 F.3d 693 (7th Cir. 2010) 11

Thomason v. *Chemical Bank*, 661 A.2d 595 (Conn. 1995) 12

Walden v. *Fiore*, 134 S. Ct. 1115 (2014) 14, 15

World-Wide Volkswagen Corp. v. *Woodson*, 444 U.S. 286 (1980) 9, 10, 24

Wyeth v. *Levine*, 555 U.S. 555 (2009) 15

Statute and Rules

29 U.S.C. § 1144(a) 13

S. Ct. Rule 37.2 1

S. Ct. Rule 37.6 1

TABLE OF AUTHORITIES—continued

Page(s)

Other Authorities and Materials

Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 GA. J. INT'L & COMP. L. 1 (1987) 25

Buehler, *Jurisdictional Incentives*, 20 GEO. MASON L. REV. 105 (2012) 22

1 BUSINESS AND COMMERCIAL LITIGATION IN THE FEDERAL COURTS § 2:25 (2011) 11, 12

H. JAMES, RODERICK HUDSON (1980) 13

McFarland, *Dictum Run Wild: How Long-Arm Statutes Extended to the Limits of Due Process*, 84 B.U. L. REV. 491 (2004) 21

Petition for a Writ of Certiorari, *Carnival Cruise Lines, Inc.* v. *Shute* (No. 89-1647) (filed April 24, 1990) 4

Simard, *Meeting Expectations: Two Profiles for Specific Jurisdiction*, 38 IND. L. REV. 343 (2005) 18

Twitchell, *Why We Keep Doing Business with Doing-Business Jurisdiction*, 2001 U. CHI. LEGAL F. 171 (2001) 24

Weintraub, *A Map Out of the Personal Jurisdiction Labyrinth*, 28 U.C. DAVIS L. REV. 531 (1995) 22

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*[1]

The Product Liability Advisory Council, Inc. (PLAC) is a non-profit corporation with 94 corporate members representing a broad cross-section of American industry. Those members include manufacturers and sellers of a variety of products, including automobiles, trucks, aircraft, electronics, cigarettes, tires, chemicals, pharmaceuticals, and medical devices. (A list of PLAC's corporate members is appended to this brief.) PLAC's primary purpose is to file *amicus curiae* briefs in cases raising issues that affect the development of product liability litigation and PLAC's members. This is such a case.

STATEMENT

This case raises a significant and recurring question of federal constitutional law that has sharply divided the lower federal and state courts. The issue concerns a crucial limitation imposed by

---

[1] All parties have submitted to the Clerk letters granting blanket consent to the filing of *amicus* briefs. Pursuant to S. Ct. Rule 37.2, PLAC states that all parties' counsel received timely notice of the intent to file this brief. Pursuant to S. Ct. Rule 37.6, *amicus* states that no counsel for a party wrote this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution to this brief's preparation or submission.

the Due Process Clause on the exercise of *in personam* jurisdiction by state courts (and federal courts applying state long-arm statutes), namely: What is the requisite nexus between a nonresident defendant's contacts with the forum and the plaintiff's legal claims? Only this Court can provide a definitive and nationally uniform answer to that question.

1. *Specific Jurisdiction and the Origins of the Nexus Requirement.* The Fourteenth Amendment's Due Process Clause limits the power of a state court to render a valid judgment against a nonresident defendant. *Kulko* v. *Superior Court of California*, 436 U.S. 84, 91 (1978). A court may exercise *in personam* jurisdiction only if the defendant has "certain minimum contacts" with the forum "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *International Shoe Co.* v. *Washington*, 326 U.S. 310, 316 (1945) (internal quotations omitted). The minimum-contacts requirement ensures that a defendant has "fair warning" that a decision to engage in particular activities may subject it to the jurisdiction of a foreign sovereign. *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 472 (1985).

The nature of forum contacts that provide such fair warning hinges on whether a court is exercising "general" or "specific" jurisdiction. See *id.* at 472-73 & n.15; *Daimler AG* v. *Bauman*, 134 S. Ct. 746, 757 (2014) (referring to "'the essential difference between case-specific and all-purpose (general) jurisdiction'") (quoting *Goodyear Dunlop Tires Operations, S.A.* v. *Brown*, 564 U.S. 915, 927 (2011)). "For an individual

[defendant], the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation *is fairly regarded as at home*" (such as the state of incorporation or principal place of business). *Goodyear*, 564 U.S. at 924 (emphasis added).

Cases involving specific jurisdiction, this Court has explained, require a lesser showing of forum contacts by the defendant but allow jurisdiction only if the plaintiff's claims "arise out of or relate to" those contacts. *Helicopteros Nacionales de Colombia, S.A.* v. *Hall*, 466 U.S. 408, 414 & nn.8-9 (1984). In *Helicopteros*, Justice Brennan, alone in dissent, criticized the majority for "refusing to consider any distinction between controversies that 'relate to' a defendant's contacts with the forum and causes of action that 'arise out of' such contacts." 466 U.S. at 420 (dissent). The majority responded:

> Absent any briefing on the issue, we decline to reach the questions (1) whether the terms "arising out of" and "related to" describe different connections between a cause of action and a defendant's contacts with a forum, and (2) what sort of tie between a cause of action and a defendant's contacts with a forum is necessary to a determination that either connection exists.

466 U.S. at 415 n.10. Only Justice Brennan addressed these issues.

2. *The Development of A Circuit Split Following* Helicopteros, *and This Court's Decision in* Shute. The federal circuits gave conflicting answers to the questions identified but reserved in *Helicopteros*. In

Shute v. *Carnival Cruise Lines*, 897 F.2d 377 (1990), the Ninth Circuit, agreeing with several circuits but disagreeing with several others, adopted a "but for" standard, rejecting the more restrictive "proximate cause" test. *Id.* at 383-86. This Court then granted review to address the nexus requirement as well as a second question concerning the enforceability of a forum-selection clause. See 498 U.S. 807 (1990) (order).[2] Ultimately, the Court reversed based on the forum-selection clause without reaching the nexus requirement. 499 U.S. 585, 589-90 (1991).

3. *The Growing Confusion and Conflict Following* Shute. As the petition demonstrates (Pet. 11-14), the conflict in the lower courts has deepened since *Shute*. At least two circuits and three state supreme courts have joined the "but for" camp; three other circuits have adopted the "proximate cause" standard. A third group of courts – including one circuit and three state supreme courts – have developed a new and even more expansive "substantial connection" or "discernible relationship" test that can be satisfied in the absence of *any* causal relationship ("but for" or proximate) between a defendant's forum contacts and the plaintiff's claims. See pages 10-11, *infra*.

4. *This Court's Recent Decisions.* In recent years, this Court has issued a series of decisions

---

[2] See No. 89-1647 Pet. for Cert. i, 5, 8 & n.6 (citing circuit split and asking Court to decide "what sort of relationship must exist between the litigation and the defendant's activities in the forum state so as to support the assertion of specific jurisdiction").

aimed at clarifying the principles governing *in personam* jurisdiction and reining in lower courts that had sought to either "stack[] the deck" in the jurisdictional inquiry or assert jurisdiction that was "exorbitant" or "unacceptably grasping." *Daimler*, 134 S. Ct. at 759, 761. Thus, in *Goodyear*, this Court (a) rejected an approach by the North Carolina Court of Appeals that "[c]onfus[ed] or blend[ed] general and specific jurisdictional inquiries," clarifying that the "stream of commerce" theory was *not* a proper basis for general (as opposed to specific) jurisdiction; (b) clarified the permissible bases for the exercise of general jurisdiction (see pages 2-3, *supra*); and (c) reaffirmed certain limits on specific jurisdiction in product liability cases. 564 U.S. at 919-20, 924-29.[3]

5. *The Decision Below.* This case involves 575 non-California residents (respondents here) who brought suit in California state court alleging various California product liability claims against petitioner Bristol-Myers based on respondents' use of Plavix, a prescription drug manufactured by Bristol-Myers. Pet. 5 & n.1. All of respondents' claims were based on injuries allegedly occurring outside of California as a result of prescriptions written and filled out-of-state. Pet. 6.

The California Supreme Court unanimously held that, under *Daimler* and *Goodyear*, California

---

[3] See also *Daimler*, 134 S. Ct. at 760-61 (clarifying general jurisdiction); *J. McIntyre Machinery, Ltd.* v. *Nicastro*, 564 U.S. 873, 877, 879-87 (2011) (plurality) (clarifying "stream of commerce" theory and reining in New Jersey Supreme Court's unduly expansive approach); *id.* at 887-92 (Breyer, J., joined by Alito, J., concurring) (same).

courts may not exercise general jurisdiction over Bristol-Myers. Pet. App. 11a-19a, 44a; *id.* at 46a (dissent). A 4-3 majority, however, upheld the exercise of specific jurisdiction. *Id.* at 20a-45a. With regard to the crucial nexus requirement, the majority explained that, under prior California precedent, a "claim need not arise directly from the defendant's forum contacts in order to be sufficiently related to the contact to warrant the exercise of specific jurisdiction"; it is enough that a claim bears a "substantial connection" to defendant's forum contacts. *Id.* at 25a, 27a (internal quotations omitted). The majority applied a "sliding scale" approach under which "the intensity of forum contacts and the connection of the claim to those contacts are inversely related." *Id.* at 25a (internal quotations omitted).

Applying those standards, the majority concluded that California courts could exercise specific jurisdiction over Bristol-Myers in cases involving Plavix that was prescribed, distributed, sold by a pharmacy, ingested, and allegedly caused injuries to nonresidents, all outside of California. In so concluding, the majority relied substantially on the fact that Bristol-Myers, in California, had sold "the same allegedly defective product" to other consumers and had engaged in the same nationwide "marketing and promotion" of Plavix. Pet. App. 28a. The court also invoked the sliding scale to conclude that Bristol-Myers's "extensive contacts with California establish minimum contacts based on a less direct connection between [Bristol-Myers's] forum activities and plaintiffs' claims than might otherwise be required," pointing to the fact that Bristol-Myers, in

California, had sales representatives, a distributor, and certain research and development facilities (which had not been involved in Plavix's development). *Id.* at 29a-32a. Three Justices dissented. *Id.* at 46a-87a.

SUMMARY OF ARGUMENT

This case presents the Court with a valuable opportunity to address an important and recurring issue of federal constitutional law on which the lower federal and state courts are hopelessly divided: What nexus is required by due process between a nonresident defendant's forum contacts and the plaintiff's claims before specific jurisdiction may be exercised? Only this Court can provide a definitive and nationally uniform answer.

I. The conflict is deep, acknowledged, and entrenched. It includes multiple instances (as here) of divergent positions taken by a state supreme court and the federal circuit in which it sits. The issue has been exhaustively litigated by state and federal courts and thoroughly analyzed by commentators. Because the pervasive confusion in the lower courts is traceable to language in this Court's own decisions, only this Court can provide clarity. This Court has already determined that the issue warrants its attention by granting review in a previous case ultimately resolved on other grounds. The issue is even more important today, given the widening of the conflict in the intervening years and the potential for the California Supreme Court's deeply flawed decision to undermine this Court's recent

jurisdictional teachings and sow confusion and unpredictability.

Without further clarification or refinement by this Court, "relates to" is simply not a predictable or determinate standard. This Court has recognized the breadth and fundamental indeterminacy of that phrase or its equivalent in other settings, such as ERISA's preemption clause and RICO. Moreover, as understood by the court below, the "substantial connection" test imposes no more meaningful or predictable limits on relatedness. In particular, the lower court's "same product" rationale is open-ended and overlooks the fundamental regulatory and economic reasons why most manufacturers, both large and small, make uniform products. And the "nationwide advertising" rationale is potentially far-reaching given the ubiquitous use of social media and the internet today by companies of all sizes. The lower court's use of a "sliding scale" to measure whether a "substantial connection" exists only compounds the indeterminacy and unpredictability.

II. The issue presented here arises with great frequency and is surpassingly important to both small and large product manufacturers as well as other civil defendants. Most states have long-arm statutes that reach as far as due process permits, and by last count the "minimum contacts" issue is adjudicated in more than a thousand state and federal decisions each year. The nexus requirement is a component of every case involving specific jurisdiction, and such cases will only become more numerous in light of this Court's recent clarification of the limits on general jurisdiction.

The issue is also enormously significant for other reasons. It involves the due process rights of civil defendants. It also involves a fundamental question of federalism and interstate comity concerning the adjudicative authority of the states. Beyond that, personal jurisdiction issues are often case-dispositive. And if allowed to stand, the decision below will make the California courts a magnet for all sorts of product liability litigation involving U.S. and foreign manufacturers, both large and small. Finally, the jurisdictional overreach by the California Supreme Court, if left uncorrected, may trigger reciprocal treatment of American companies by other countries.

ARGUMENT

I. THIS COURT SHOULD RESOLVE THE SERIOUS CONFLICT AND CONFUSION IN THE LOWER COURTS OVER A CRUCIAL DUE PROCESS LIMITATION ON SPECIFIC JURISDICTION

The Due Process Clause prohibits a court from exercising personal jurisdiction unless the "defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 297 (1980). That proscription "'gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.'" *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 472 (1985)

(quoting *World-Wide Volkswagen*, 444 U.S. at 297). This Court's "minimum contacts" test thus serves to ensure that a defendant has fair warning that a decision to engage in particular activities may subject it to the jurisdiction of a foreign sovereign.

Clear rules are a virtue in most areas of the law. But they are essential with respect to personal jurisdiction, where predictability and fair notice are required by due process. This case presents the Court with an opportunity to dispel serious confusion – and resolve longstanding conflicts – in the lower courts about an issue that arises with surpassing regularity: the meaning of the "nexus" requirement in cases involving specific jurisdiction.

A. There Is Widespread Confusion Concerning The Meaning Of The Nexus Requirement

As the petition demonstrates (Pet. 11-14), there is an entrenched conflict in the lower courts over how the questions identified (but reserved) by this Court in *Helicopteros* (see page 3, *supra*) should be answered. Courts have developed at least three different approaches to evaluating whether a plaintiff's claims "arise out of or relate to" a defendant's forum contacts. *Helicopteros Nacionales de Colombia, S.A.* v. *Hall*, 466 U.S. 408, 414 & nn.8-9 (1984). As explained above (at 3-4), a conflict in the circuits already existed when this Court granted review in *Carnival Cruise Lines, Inc.* v. *Shute*, 499 U.S. 585 (1990).

That conflict has significantly deepened in the intervening years. Thus, as petitioner shows, the

Fourth and Tenth Circuits and the highest courts of Arizona, Massachusetts, and Washington have now joined the Ninth Circuit in the "but for" camp. Pet. 11-12 (citing cases). At the same time, the Third, Seventh, and Eleventh Circuits and the Oregon Supreme Court have now joined the First Circuit in adopting proximate cause as the governing test. See *id.* at 12-14 (same). Even more troubling, a third group of courts – including the Federal Circuit and the highest courts of California, Texas, and the District of Columbia – have beaten a new path by adopting an even more amorphous "substantial connection" or "discernible relationship" test that can be satisfied in the absence of *any* causal relationship ("but for" or proximate) between defendant's forum contacts and plaintiff's claims. See Pet. 14-15 (discussing cases). Some of these decisions – like the 4-3 decision below – have been rendered by sharply divided courts. *E.g.*, *Shoppers Food Warehouse* v. *Moreno*, 746 A.2d 320 (D.C. 2000) (en banc) (4-3).[4]

Courts and commentators alike have recognized the serious conflict in the lower courts over the meaning of the nexus requirement. See, *e.g.*, *Tamburo* v. *Dworkin*, 601 F.3d 693, 708 (7th Cir. 2010) (noting "conflict among the circuits"); *O'Connor* v. *Sandy Lane Hotel Co.*, 496 F.3d 312, 318-20 (3d Cir. 2007) (noting "lack [of] any consensus" and describing "[t]hree approaches"); 1 BUSINESS AND

---

[4] These conflicts include multiple instances in which a state's highest court has taken a position that differs from the circuit in which that state is located. This Court has not hesitated to address conflicts of this kind to prevent forum-shopping. See, *e.g.*, *Baldwin* v. *Alabama*, 472 U.S. 372, 374 (1985).

COMMERCIAL LITIGATION IN THE FEDERAL COURTS § 2:25, at 136-37 (2011) ("Without guidance from the Supreme Court, the circuit courts have developed different approaches."). They have also bemoaned this Court's failure to revisit the issue granted in *Shute*. See, *e.g.*, *O'Connor*, 496 F.3d at 318 ("Unfortunately, the Supreme Court has not yet explained the scope of this requirement."); *Thomason* v. *Chemical Bank*, 661 A.2d 595, 599-600 (Conn. 1995) (noting that this Court has required a nexus, but not "articulated a standard" for determining it).

Significantly, this issue originally arose because of *language in this Court's own decisions*. In *Helicopteros*, this Court first used the disjunctive formulation, "arise out of *or* relate to," while simultaneously indicating there might not be any difference between those two phrases. See page 3, *supra*. Given these roots of the lower courts' confusion, only this Court can provide clarity and restore uniformity to this important area of federal law.

B. Without Further Clarification Or Refinement By This Court, "Relates To" Is Not A Meaningful Or Predictable Standard

The "arising out of" formulation of the nexus requirement plainly requires a causal relationship (whether proximate or "but for") between the defendant's forum contacts and the plaintiff's claims. In contrast, "relates to" is, on its face, unclear. Although the Court in *Helicopteros* suggested that "relates to" might well *mean the same thing in this setting* as "arising out of," many lower courts have assumed otherwise.

This Court should act now to rectify this situation. Without further refinement or clarification, "relates to" cannot possibly serve as a standard that provides the requisite fair notice or "degree of predictability . . . that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *Burger King*, 471 U.S. at 472 (internal quotations omitted).

In other settings, this Court has recognized the fundamental indeterminacy of the phrase "relates to." Thus, in cases involving ERISA preemption, the Court has observed that the words "relate to" (see 29 U.S.C. § 1144(a)) are not only "clearly expansive" but also ultimately "indetermina[te]" because "'really, universally, relations stop nowhere[.]'" *De Buono* v. *NYSA-ILA Medical and Clinical Services Fund*, 520 U.S. 806, 813 (1997) (quoting H. JAMES, RODERICK HUDSON, at xli (1980)); see also *California Division of Labor Standards Enforcement* v. *Dillingham Construction, N.A., Inc.*, 519 U.S. 316, 335 (1997) (Scalia, J., joined by Ginsburg J., concurring) ("[A]pplying the 'relate to' provision according to its terms was a project doomed to failure, since, as many a curbstone philosopher has observed, *everything is related to everything else.*") (emphasis added). Because of the inherent vagueness of "relatedness," some Justices have also criticized the decision to adopt from the legislative history of RICO the phrase "continuity plus relationship" as a way of understanding the meaning of the statutory term "pattern of racketeering activity." See *H.J. Inc.* v. *Northwestern Bell Telephone Co.*, 492 U.S. 229, 252 (1989) (Scalia, J., joined by Rehnquist, C.J.,

O'Connor and Kennedy, JJ., concurring in the judgment) ("This seems to me about as helpful to the conduct of [the lower courts'] affairs as 'life is a fountain.'"). Here, of course, the "relates to" language comes from this Court's own decisions, which again is why only the Court can provide the much-needed clarification.

C. The "Substantial Connection" Test Used Below Imposes No Meaningful Or Predictable Limits On Relatedness

As expansively understood by the California Supreme Court, the "substantial connection" test is no less indeterminate than "relates to." A "connection" is simply a synonym for a "relationship." What does "substantial" mean? The only guidance provided by the majority below was to say, relying on an earlier California Supreme Court decision, that defendant's forum contacts cannot be "random." Pet. App. 27a. That is tantamount to saying there must be some "connection" or "relationship" between the forum contacts and the claims. At bottom, this understanding of "substantial" does not meaningfully narrow the field, as is confirmed by the majority's discussion of Bristol-Myers's contacts with California that supposedly formed a "substantial" connection to respondents' claims.[5]

---

[5] Although this Court occasionally has used the words "substantial connection" in its personal jurisdiction cases, it has not used that formulation as a standalone test (and in any event has given those words a limiting construction). *E.g.*, *Walden* v. *Fiore*, 134 S. Ct. 1115, 1121-22 (2014) (stating that connection "must *arise out of* contacts that the defendant

The lower court relied heavily on the fact that the "same allegedly defective product" that was prescribed and sold in other states to respondents (who then allegedly suffered injuries in those other states) was *also* sold in California to other persons. Pet. App. 28a; see also *id.* at 32a (noting that Bristol-Myers has "enjoyed sizeable revenues from the sales of its product here – *the very product* that is the subject of the claims") (emphasis added). But that is hardly a "substantial" connection to *respondents'* legal claims. Instead, it reflects basic regulatory and legal facts as well as market realities. Today, many highly regulated products in the United States (including prescription drugs such as Plavix, medical devices, and generic drugs) are subject to premarket approval or clearance processes administered by federal agencies that leave manufacturers with little or no freedom to make changes to the design, manufacture, and labeling of the product approved by the agency.[6] Still other products, such as automobiles,

---

himself creates with the forum") (emphasis altered; internal quotations omitted).

[6] See, *e.g.*, *Wyeth* v. *Levine*, 555 U.S. 555, 566-68 (2009) (discussing FDA's role in granting "premarket approval of new drugs" based on manufacturer's showing that specific compound is safe and effective for its intended uses, and noting that FDA's "approval of a new drug application includes the approval of the exact text in the proposed label"); *PLIVA, Inc.* v. *Mensing*, 564 U.S. 604, 612-14 & n.2 (2011) (generic drug must be equivalent to brand-name drug and must use same labeling); *Riegel* v. *Medtronic*, 552 U.S. 312, 319 (2008) ("Once a device has received premarket approval, [federal law] forbids the manufacturer to make, without FDA permission, changes in

are subject to extensive federal regulations even if not premarket approval or clearance. These regulatory requirements are the principal reason why the "same product" (Plavix) is sold by Bristol-Myers in other states.

Moreover, even where product uniformity does not flow from regulatory requirements, it is usually necessitated by economic efficiencies and rational production processes. This is equally true for large manufacturers and tiny "mom-and-pop" producers. Few product makers in today's economy sell only bespoke or custom-made goods. The lower court's "same product" rationale for finding a "substantial connection," if left undisturbed, could be used to force even small manufacturers to defend lawsuits in distant fora based on uniform products having been sold to consumers there, even where the plaintiff's claims have nothing to do with sales, marketing, or injuries occurring in that forum.

Equally open-ended is the "nationwide advertising" rationale for finding a "substantial connection." See Pet. App. 33a (emphasizing that Bristol-Myers engaged in a "single nationwide marketing and distribution effort"); *id.* at 28a ("nationwide marketing, promotion, and distribution of Plavix"). As explained above, certain products require uniformity in warnings and instructions because that is what is required by the FDA or other federal agencies. Beyond that, in this day of wide-

---

design specifications, manufacturing processes, labeling, or any other attribute, that would affect safety or effectiveness.").

spread internet (and social media) advertising, there is nothing to prevent courts applying the California Supreme Court's expansive approach from pointing to the existence of a company website, Facebook page, or Twitter feed as the basis for finding the requisite "national advertising" campaign. *Nicastro*, 564 U.S. at 888-90 (Breyer, J., joined by Alito, J., concurring) (expressing concern over how jurisdictional standards might be applied to a company that "targets the world by selling products from its Web site" or "markets its products through popup advertisements that it knows will be viewed in a forum"). That cannot be the law.

D. A "Sliding Scale" Only Compounds The Indeterminacy And Lack Of Predictability

The California Supreme Court embedded its expansive understanding of the "substantial connection" test in an overall approach that called for a "sliding scale." Thus, the majority explained that there is an "inverse[]" relationship between (i) the intensity of a defendant's forum contacts, and (ii) the degree of connection of the plaintiff's claim to those contacts. Pet. App. 22a, 25a. Under that approach, "the more wide ranging the defendant's forum contacts, the more readily is shown a connection between the forum contacts and the claim." *Id.* at 22a.

Thus, the California courts have made clear that the "substantial connection" test's limits may be jettisoned if a defendant has "wide ranging" but unrelated contacts with the state. In other words, what qualifies as a "substantial connection" to the

plaintiff's claims in one case (where a defendant has numerous wholly unrelated forum contacts) will *not* qualify as a "substantial connection" in another (where a defendant has few or none).

This approach is problematic. As the Third Circuit has correctly observed in rejecting the "sliding scale," such an approach "allow[s] courts to vary the scope of the relatedness requirement according to the quantity and quality of the defendant's [forum] contacts," with the result being "a freewheeling totality-of-the-circumstances test." *O'Connor*, 496 F.3d at 321 (internal quotations omitted). Under a sliding-scale approach, "[u]nbounded judicial intuition replaces structured analysis, and its application from case to case necessarily defies prediction." *Id.* at 322. See Simard, *Meeting Expectations: Two Profiles for Specific Jurisdiction*, 38 IND. L. REV. 343, 366 (2005) (sliding scale "severely weakens the defendant's ability to anticipate the jurisdictional consequences of its conduct"). "A standard so formless has no place in [the] relatedness inquiry." *O'Connor*, 496 F.3d at 322.[7]

---

[7] Notably, this case is a better vehicle than *Shute* for addressing the nexus requirement. In *Shute*, the Court was asked to choose between the causation-based standards that had been developed to date. Since jurisdiction there could be exercised under a "but for" standard, *Shute* provided no occasion to address non-causation-based standards (much less those embedded in a sliding scale), and in any event those other approaches had yet to be developed. The petition in this case asks this Court to address a more fundamental question that does not necessarily require any choice between causation-based standards: May specific jurisdiction be exercised over a defendant whose forum contacts have *no* causal connection to

E. The Decision Below Ignores And Undermines This Court's Recent Teachings

As explained above (at 4-5), this Court in recent years has issued a series of decisions aimed at preserving the essential distinction between general and specific jurisdiction and clarifying the limits on both. The decision below is inconsistent with, and undermines, certain aspects of these decisions.

In *Daimler* and *Goodyear*, this Court took pains both to clarify the standards governing general jurisdiction and to correct lower-court jurisdictional decisions that were "unacceptably grasping" (*Daimler*, 134 S. Ct. at 761) or had "[c]onfus[ed] or blend[ed] general and specific jurisdictional inquiries." *Goodyear*, 564 U.S. at 919. In *Goodyear* and *Nicastro*, the Court clarified certain limits on the "stream of commerce" theory, which is typically deployed by courts in cases involving product liability claims. For example, *Goodyear* made clear that the "stream of commerce" theory cannot be used as a basis for general jurisdiction. See 564 U.S. at 919-20, 926-29.

The Court's unanimous opinion in *Goodyear* also reflected the well-understood limits on the "stream of commerce" theory. "Because the episode-in-suit, the bus accident, occurred in France," the Court reasoned, "and the tire alleged to have caused the

---

the plaintiff's claims? At the same time, the question presented is broad enough to allow the Court to choose from among the conflicting standards if it wishes to do so.

accident was manufactured and sold abroad, North Carolina courts lacked specific jurisdiction to adjudicate the controversy." *Id.* at 919. As Bristol-Myers points out (Pet. 23-25 & n.3), this reasoning in *Goodyear* suggests "a simple rule for specific jurisdiction in a product-defect case: If the plaintiff is not injured in the forum and the allegedly defective product was not manufactured or sold in the forum, then there is no specific jurisdiction in the forum." Pet. 24.

The decision below departs from that clear principle and thus effectively circumvents long-settled limits on "stream of commerce" jurisdiction. In so doing, it creates greater uncertainty for product manufacturers. *Goodyear*'s clear rule, in contrast, provides a certain degree of predictability. If a manufacturer knows that it will be subject to specific jurisdiction over product liability claims involving a particular product only in a state where it has manufactured or sold that product, and then only for the products actually sold or manufactured there that caused injury in the state, it can make an informed decision about whether and to what extent to manufacture in (or sell directly into) the state. Under the California Supreme Court's approach, in contrast, the decision to forbear manufacturing or selling a product in a state may afford little protection if the defendant has substantial other (but unrelated) activities there.

Nor is this all. As the dissenters below correctly pointed out (Pet. App. 50a-51a), the majority's approach "undermines" the "essential distinction between specific and general jurisdiction" as articu-

lated in both *Daimler* and *Goodyear*. The nexus requirement, after all, "is the divining rod that separates specific jurisdiction cases from general jurisdiction cases." *Nowak* v. *Tak How Investments, Ltd.*, 94 F.3d 708, 714 (1st Cir. 1996) (internal quotations omitted). This Court granted review in *Goodyear* to address a lower court decision that "[c]onfus[ed] or blend[ed] general and specific jurisdictional inquiries" (564 U.S. at 919). It should do so here as well.

II. THE QUESTION PRESENTED IS RECURRING AS WELL AS CRITICALLY IMPORTANT TO PRODUCT MANUFACTURERS BOTH LARGE AND SMALL

A. The Issue Arises With Great Frequency

The federal due process limits on personal jurisdiction are a frequent subject of litigation in both state and federal courts. Most states have long-arm statutes that reach as far as the Due Process Clause permits. See McFarland, *Dictum Run Wild: How Long-Arm Statutes Extended to the Limits of Due Process*, 84 B.U. L. REV. 491, 525-30 (2004) (32 of 50 states). In those jurisdictions (and in the countless federal cases where such state long-arms are applied), the reach of the state's long-arm statute and the outer limits of the Due Process Clause present the same question. And even in states where long-arm statutes do not by their terms (or as construed) extend as far as due process permits, due process challenges (which can include those based on the nexus requirement) are frequently brought to assertions of jurisdiction.

It should come as no surprise, then, that issues of personal jurisdiction (and in particular questions concerning this Court's "minimum contacts" test) have been described as "one of the most litigated issues in state and federal courts." Weintraub, *A Map Out of the Personal Jurisdiction Labyrinth*, 28 U.C. DAVIS L. REV. 531, 531 & n.5 (1995) (noting that more than 2,300 cases involving "minimum contacts" test were decided in 1990-95); Buehler, *Jurisdictional Incentives*, 20 GEO. MASON L. REV. 105, 108 & n.16 (2102) (noting 5,767 such cases in 2007-12). This Court's recent decisions in *Daimler* and *Goodyear*, which underscore the important limits on *general* jurisdiction, will no doubt ensure that questions concerning *specific* jurisdiction will arise with even greater frequency in the future. And because the nexus requirement is a part of the basic test for specific jurisdiction, it arises with great regularity, not just as here in product liability cases but in a wide range of civil litigation.

B. The Issue Is Enormously Significant

The meaning of the nexus requirement is frequently litigated and involves the fundamental due process rights of civil defendants. As next explained, there are at least four additional reasons why the question presented is important to product manufacturers, both large and small (including PLAC's members), as well as to other defendants.

First, issues of personal jurisdiction are often case-dispositive. That is certainly true here. Had the California Supreme Court applied either the proximate cause or "but for" test in evaluating the nexus between Bristol-Myers's California contacts

and respondents' legal claims, those claims would have been dismissed for lack of personal jurisdiction.

Second, if the decision below is allowed to stand, the California state courts predictably will become a magnet for all sorts of product-related litigation involving large national manufacturers of non-customized products, even in situations where the plaintiff, the product sale, and the alleged injury have no connection whatsoever to that state. Because large manufacturers such as Bristol-Myers are quite likely to have substantial assets, employees, or operations in a state as large and important as California (even if, as here, they represent a small fraction of the company's U.S. footprint), many such companies that clearly are not "at home" in California (*Daimler*, 134 S. Ct. at 760) may nonetheless be subject to lawsuits unrelated to their California contacts under the logic of the decision below. Indeed, given the potentially far-reaching sweep of the "same product" and "national advertising" rationales, even very small manufacturers without any significant assets or operations in California might well be found to have a "substantial connection" to the state if those manufacturers' (a) uniform products are sold to California consumers, and (b) social-media advertising or a website is accessed there. And the California Supreme Court's approach, if used by *other* courts, will create similar litigation magnets for plaintiffs in other fora.

Third, the importance of the issue goes beyond the potential for distortions in the civil justice system, forum-shopping, and unfairness to certain defendants. At bottom, the nexus requirement raises

a fundamental question of *federalism and interstate comity*, namely, whether one state may import a cause of action that another state ought by custom and right have the power to resolve in its own courts. See *World-Wide Volkswagen*, 444 U.S. at 291-94 (Due Process Clause in this setting "act[s] as an instrument of interstate federalism"; minimum contacts inquiry serves "to ensure that the States[,] through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system"); *Hanson* v. *Denckla*, 357 U.S. 235, 250-51 (1958) (constitutional restrictions on personal jurisdiction are "more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States."). Preserving these foundational lines between the power of one sovereign state and another is uniquely a function of this Court. Review should be granted to enforce this federalism principle by reining in California's jurisdictional overreach.

Fourth, the issue is important to U.S. manufacturers and other businesses, both large and small, because of the possibility that *other countries* will reciprocate by adopting the same far-reaching approach employed by the California Supreme Court. The international community has long lamented what it has regarded as lax U.S. rules regarding personal jurisdiction. See *Daimler*, 134 S. Ct. at 763; Twitchell, *Why We Keep Doing Business with Doing-Business Jurisdiction*, 2001 U. CHI. LEGAL F. 171, 173 (2001). If those rules are further diluted by an approach that is expansive and blurs the bedrock distinction between specific and general jurisdiction,

other countries may follow suit by making it much easier for U.S. companies, both large and small, to be haled into foreign courts to answer for claims bearing no causal relationship to activities in those countries. Indeed, many nations have enacted reciprocity measures authorizing their courts to exercise jurisdiction over a foreign defendant if that defendant's home country would assert jurisdiction in the same situation. Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 GA. J. INT'L & COMP. L. 1, 15 (1987). These significant "[c]onsiderations of international rapport" (*Daimler*, 134 S. Ct. at 763) underscore the importance of the issue presented in this case.

CONCUSION

For the foregoing reasons, and those set forth in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

HUGH F. YOUNG, JR.
Product Liability
Advisory Council, Inc.
1850 Centennial Park Dr.
Suite 510
Reston, VA 20191
(703) 264-5300

ALAN E. UNTEREINER
Counsel of Record
Robbins, Russell, Englert,
Orseck, Untereiner &
Sauber LLP
1801 K Street, N.W.
Suite 411L
Washington, D.C. 20006
(202) 775-4500
auntereiner@robbinsrussell.com

NOVEMBER 2016

APPENDIX

PRODUCT LIABILITY ADVISORY COUNCIL, INC.
LIST OF CORPORATE MEMBERS

3M
Altec, Inc.
Altria Client Services LLC
Astec Industries
Bayer Corporation
BIC Corporation
Biro Manufacturing Company, Inc.
BMW of North America, LLC
The Boeing Company
Bombadier Recreational Products, Inc.
Boston Scientific Corporation
Bridgestone Americas, Inc.
Bristol-Myers Squibb Corporation
C.R. Bard, Inc.
Caterpillar Inc.
CC Industries, Inc.
Celgene Corporation
Chevron Corporation
Cirrus Design Corporation
Continental Tire the Americas LLC
Cooper Tire & Rubber Company
Crane Co.
Crown Equipment Corporation
Daimler Trucks North America LLC
Deere & Company
Delphi Automotive Systems
The Dow Chemical Company
E.I. duPont de Nemours and Company
Emerson Electric Co.

Exxon Mobil Corporation
FCA US LLC
Ford Motor Company
Fresenius Kabi USA, LLC
General Motors LLC
Georgia-Pacific LLC
GlaxoSmithKline
The Goodyear Tire & Rubber Company
Great Dane Limited Partnership
Hankook Tire America Corp.
Harley-Davidson Motor Company
The Home Depot
Honda North America, Inc.
Hyundai Motor America
Illinois Tool Works Inc.
Intuitive Surgical, Inc.
Isuzu North America Corporation
Jaguar Land Rover North America, LLC
Jarden Corporation
Johnson & Johnson
Kawasaki Motors Corp., U.S.A.
KBR, Inc.
Kia Motors America, Inc.
Kolcraft Enterprises, Inc.
Lincoln Electric Company
Magna International Inc.
Mazak Corporation
Mazda Motor of America, Inc.
Medtronic, Inc.
Merck & Co., Inc.
Meritor WABCO
Michelin North America, Inc.
Microsoft Corporation
Mitsubishi Motors North America, Inc.
Mueller Water Products

Novartis Pharmaceuticals Corporation
Novo Nordisk, Inc.
Pella Corporation
Pfizer Inc.
Pirelli Tire, LLC
Polaris Industries, Inc.
Porsche Cars North America, Inc.
RJ Reynolds Tobacco Company
Robert Bosch LLC
SABMiller Plc
The Sherwin-Williams Company
St. Jude Medical, Inc.
Stryker Corporation
Subaru of America, Inc.
Takeda Pharmaceuticals U.S.A., Inc.
TAMKO Building Products, Inc.
Teleflex Incorporated
Toyota Motor Sales, USA, Inc.
Trinity Industries, Inc.
U-Haul International
The Viking Corporation
Volkswagen Group of America, Inc.
Volvo Cars of North America, Inc.
Wal-Mart Stores, Inc.
Western Digital Corporation
Whirlpool Corporation
Yamaha Motor Corporation, U.S.A.
Yokohama Tire Corporation
ZF TRW
Zimmer Biomet